



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10**

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OFFICE OF
ECOSYSTEMS, TRIBAL
AND PUBLIC AFFAIRS

June 9, 2015

Michelle Walker, Branch Chief
U.S. Army Corps of Engineers
Seattle District Regulatory Branch
P.O. Box 3755
Seattle, Washington 998124-3755

Dear Ms. Walker:

Thank you for the opportunity to review the December 2014 draft Programmatic Biological Assessment ("PBA") on Shellfish Activities in Washington State Inland Marine Waters (U.S. Army Corps of Engineers Regulatory Program, December 2014). We have reviewed this document and have significant concerns regarding the removal of Conservation Measure #7 from this PBA. What follows is a detailed explanation of these concerns and the rationale for our conclusion that without avoidance and minimization measures (like those Conservation Measure #7 would require), authorized shellfish activities would not comply with Clean Water Act § 404(b)(1).

As previously proposed, Conservation Measure #7 would have required that: "For continuing activities in 'fallow' areas, those activities shall not occur within 16 horizontal feet of native eelgrass (*Zostera marina*). If eelgrass is present in the vicinity of a fallow acreage proposed for shellfish activities, the eelgrass shall be delineated and a map or sketch prepared and submitted to the Corps."

The above requirement would prevent shellfish aquaculture activities from encroaching on and impacting eelgrass beds in areas that were cultivated in the past but had returned to supporting native eelgrass. With the conservation measure in place, activities would have to be set back 16-feet from eelgrass; eelgrass would have to be surveyed; and activities encroaching into "fallow" areas supporting eelgrass would require individual consultation with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (and would not be authorized under the PBA). By removing this measure, there would be no set-back or "buffer" requirement, no survey requirement to establish the density and extent of the eelgrass bed, and activities could encroach into fallow areas supporting eelgrass beds without any avoidance or minimization provisions. Further, no compensatory mitigation is currently required for Corps' permitted shellfish aquaculture activity impacts, leaving eelgrass beds unprotected and unmitigated.

The Corps estimates 11,166 acres of "fallow" area where "continuing" shellfish operations could return and eelgrass co-occurs (Table E-1, page E-9 of the PBA). Of that conservatively estimated 11,166 acres, there are 7,448 acres in Willapa Bay, 2,194 acres in North Puget Sound, 1,152 acres in Grays Harbor, 257 acres in Hood Canal, and 115 acres in South Puget Sound. While the interspersed, density and extent of eelgrass may vary across these very different biogeographic regions, removing the requirement to survey and establish boundaries or delineate eelgrass extent would pose a significant threat to this ecologically and regionally significant special aquatic site type.

Native eelgrass beds have been well documented as critical habitat that are nursery grounds for juvenile salmonids and myriad other fish species. They provide significant primary productivity and trophic system support functions. They are not easily mimicked or replaced and are difficult to replicate.

For the proposed activities to comply with the Clean Water Act § 404(b)(1) Guidelines ("Guidelines"), which are the substantive environmental criteria used in evaluating discharges of dredged or fill material proposed under Clean Water Act § 404, the EPA believes that avoidance and minimization measures to protect these 11,000+ acres with eelgrass should be required. In addition, the 2008 Joint Agency Federal Rule on Compensatory Mitigation generally requires that all Corps permitted activities meet avoidance, minimization and compensatory mitigation requirements (i.e., at a minimum, replacement of lost eelgrass beds and their functions).

The EPA believes that allowing shellfish aquaculture activities to return or expand into 11,166 acres of native eelgrass beds would cause or contribute to significant adverse impacts on this regionally significant special aquatic site type. The anticipated impacts include impacts to trophic system interactions, to physical and biotic processes, to plankton and multiple species of fish, as well as to native shellfish. This outcome would not comply with 40 CFR § 230.10(c) which states that "no discharge of dredge or fill material shall be permitted that will cause or contribute to significant degradation of waters of the United States."

We see removal of the requirement for a 16-foot setback from existing eelgrass and requirements to survey and delineate eelgrass in "fallow" areas as leading to non-compliance with 40 CFR § 230.10(d), which states that "no discharge ... shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem." The EPA believes that requiring a 16-foot setback and survey requirements of eelgrass beds would constitute appropriate and practicable steps to avoid and minimize impacts that would (cumulatively) cause significant degradation to special aquatic sites.

The Clean Water Act § 404(b)(1) Guidelines, the 2008 Compensatory Mitigation Rule, and the 2012 Nationwide Permits General Condition #23 all require that the Corps and the EPA seek to ensure that all adverse impacts to aquatic resources from permitted activities are mitigated. To do this, all measures to avoid, minimize and provide compensatory mitigation for unavoidable impacts should be pursued.

The EPA believes that without measures to ensure avoidance, minimization and compensation for the potential loss or damage to more than 11,000 acres of native eelgrass beds, Corps decisions to authorize shellfish activities in "fallow" areas would not comply with the Guidelines. Of further concern is that this federal action (to remove Conservation Measure #7) would further degrade this key resource, which is used as a critical biological indicator to track the condition of Puget Sound. No progress has been made to date to achieve the 2020 target for increasing eelgrass in Puget Sound by 20 percent. Given the possibility of such impacts, the likelihood of achieving this goal is further reduced.

We strongly encourage the Corps to incorporate conditions or measures to ensure that all avoidance, minimization and compensatory mitigation measures and requirements are addressed and that the cumulative impacts associated with potential authorized permits in eelgrass beds comply with all provisions of the Clean Water Act federal regulatory requirements, including 40 CFR § 230.10(a)-(d). With that goal in mind, we recommend either the Corps retain Conservation Measure #7 in the PBA or require Nationwide Permit pre-discharge notification and eelgrass surveys for shellfish activities in "fallow" areas.

Of further significance and important consideration is the federal government's responsibility to address tribally reserved treaty rights to harvest fish and shellfish and maintain the habitats upon which they depend. While this issue is very complex with regard to shellfish aquaculture, the essence is this: the Corps' 404 permit decisions must demonstrate compliance not only with the Endangered Species Act and Essential Fish Habitat requirements, but must also ensure that all Clean Water Act requirements are met and tribal treaty rights are upheld. We understand that two Puget Sound tribal consortia (Skagit Systems Cooperative and Northwest Indian Fish Commission) have expressed strong concerns that treaty reserved resources would be significantly impacted by removing the currently required avoidance and minimization measures on eelgrass beds in fallow areas.

I welcome the opportunity to discuss our concerns with you further. Please feel free to call me at (206) 553-2581 or Ms. Linda Storm of my staff at (206) 553-6384 or storm.linda@epa.gov with any questions or concerns.

Sincerely,

A handwritten signature in blue ink, appearing to read 'R. David Allnutt', with a stylized flourish at the end.

R. David Allnutt, Director
Office of Ecosystem, Tribal, and Public Affairs

cc: Dan Opalski, Director
EPA Region 10, Office of Water